

# **Not so convenient after all: Cell Phones and Employer Liability**

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*“Thus, although Neff Rental may not have expressly authorized conducting business on a cell phone while driving it certainly did not prohibit it” — Ellender v. Neff Rental Inc.*

We have all seen distracted drivers, eating and drinking, attending to a child's needs in the rear seat, talking on a cell phone, text messaging, shaving, applying make-up, or tuning in to the radio, all while attempting to focus on driving. The phenomenon of driver distraction is not new; emerging technologies such as PDAs, Blackberries, and global positioning systems are simply increasing its visibility, particularly in the political and legal spheres.

Drivers whose distraction leads to a collision are typically held responsible by our legal system. But employers take note: if the distraction is work-related, you too could be implicated.

## **What we've learned about cell phones**

The cellular telephone in particular seems to have become the poster child for distracted driving, and for good reason. Studies have shown that talking on a cell phone reduces a driver's reaction time by a quarter of a second. This in turn increases a person's risk of having a collision by four times. In fact, the increased risk of collision due to driving while talking on a cell phone is comparable to the increase in risk caused by driving under the influence of alcohol.

One might reasonably assume that using a hands-free device can negate the risk posed by driving and talking on a cell phone. However, researchers have repeatedly concluded that there is no difference between the risk posed by using hands-free and handheld cell phones while driving. In fact, it's not so much the physical distraction of holding a cell phone while driving that poses a danger; it's the conversation itself.

Several studies have shown that the human brain is incapable of fully concentrating on both driving and talking on a cell phone at the same time. These two tasks require the resources of several identical areas of the brain. Any specific area of the brain can only process one task at once. This means that at any given second, the brain is able to focus on one of these activities, but not both. Consequently, when a person attempts to do both at once, his or her capacity to fully concentrate on driving is significantly reduced.

Although some might think that driving and talking on a cell phone is an acquired skill, research has shown that experience cannot mitigate the risks. Nor can proper training eliminate them. It is simply impossible to focus the same cognitive processes on two things at once.

In light of the risk associated with driving and talking on a cell phone, governments have taken action. Nova Scotia, Quebec, and Newfoundland all have legislative bans on the use of hand-held cell phones when driving, while Ontario and Alberta are considering similar legislation. Many US states also regulate the use of cell phones by drivers. It is interesting to note that the proposed bill in Ontario does not distinguish between hand-held and hands-free cellular phones. This may indicate that governments are beginning to respond to scientific research indicating that hands-free cellular telephones may pose the same level of risk as their hand-held counterparts.

## **Where the employer fits in**

These legislative efforts, backed by scientific research, provide strong evidence that the risks involved in the use of a cell phone when driving are widely known. This means that an individual who does so anyway is more likely to be found negligent by the courts. And possibly his or her employer if that act was committed in the course of the employee's duties.

This is the principle of vicarious liability. For example, if an employer requires that an employee participate in a meeting via mobile device, and as a result the employee causes a collision that injures someone, the victim may pursue the employer.

In this instance, the link between employer requirements and employee behaviour is clear. But this may not be a prerequisite. Consider these two examples from the US:

- Dyke Industries lost a US\$21 million lawsuit in a matter where an employee struck a 78-year-old woman while making a business call on a cell phone
- investment firm Smith Barney paid out US\$500,000 when one of its brokers struck and killed a father of three while making a sales call

Similar cases have not presented themselves in Canadian courts. However, the principles of vicarious liability in Canada are similar to those in the US, and the use of cell phones in the course of employment is widespread in both countries. This means Canadian courts are likely to be faced with this issue sooner rather than later.

One way in which employers can both limit their liability and keep their employees safe is by implementing a policy banning the use of cell phones, and other wireless communication devices, when driving. Such a policy must include not only the document itself, but also an effective implementation strategy.

An employer contemplating a cell phone policy might consider including some or all of these elements:

- a statement outlining the employer's stance against cell phone use while driving. This clarifies the goals sought by the employer and their importance to the organization
- applicability, expressed in a clear statement of whom the policy applies to and when. This avoids misunderstandings, helps employees to follow the policy, and facilitates policy administration
- enforcement/monitoring, which clarifies how the employer plans to ensure compliance with the policy. This is important in order for employees to take the policy seriously

Important as these elements are to the cell phone policy, their effectiveness depends on proper communication to employees. For employees to comply, they must be fully aware of its existence and implications. One way to do this would be to require all employees to read the policy and sign a letter of understanding/acknowledgement attesting to the fact that they have read and understood the policy.

Employers can also facilitate implementation and adherence to the policy by offering employees helpful hints. The Calgary Health Region, for example, suggests the following:

- while driving, avoid temptation by making your phone inaccessible
- create a voicemail message indicating that you may be driving, and offer an alternate employee's contact number
- if you must use a cell phone, pull over safely and make the call once stopped
- plan your day in such a way that your car does not become a satellite office; in other words, do not leave phone calls for the commute to save time

A cell phone policy is not only a good response to the scientific literature, it is also a necessary precaution in light of American jurisprudence. One example of this is the case of *Ellender v. Neff Rental Inc.*, a Louisiana court decision. The Court of Appeal of Louisiana affirmed the trial judge's finding that the absence of a policy against the use of cell phones while driving was a significant factor in holding the employer vicariously liable for the actions of its employee.

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